IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 335

AETNA INSURANCE COMPANY,

Petitioner,

against

ROBERT C. JEFFCOTT,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

This cause presents no reason within Rule 38, paragraph 5, for the issuance of a writ of certiorari. Neither the decision of the Circuit Court of Appeals (R. 1932-41, reported in 1942 A. M. C. 1021, but not yet officially reported) nor any one of the three separate decisions in the District Court, which the Circuit Court of Appeals affirmed (that of Judge Coxe overruling petitioner's exceptions to the first and third causes of action in the libel—R. 44-50, officially reported in 32 F. Supp. 409; that of Judge Bondy denying petitioner's motion to dismiss the libel for lack of admiralty jurisdiction—R. 80-1, not officially reported; that of Judge Clancy finding as a fact, after trial on the merits at which all of the thirty-eight witnesses testified in open court, that the vessel was a constructive total loss

within the terms of the policies and awarding decree to respondent for the full amount of both policies plus sue and labor charges as provided therein—R. 1885-1906, officially reported in 40 F. Supp. 404) is in conflict with applicable decisions of this Court or with applicable decisions of another Circuit Court of Appeals or with applicable local decisions.

The questions involved on this petition are not of general importance nor do they affect the public interest; they merely relate to private contractual rights under petitioner's marine insurance policies issued to respondent in consideration of premiums duly paid. The basic points of law upon which the Courts below found petitioner liable to respondent on these policies are, in fact, well established by the decisions of this Court (*New England Marine Ins. Co.* v. *Dunham,* 11 Wall. 1; *Marcardier* v. *Chesapeake Ins. Co.,* 8 Cranch. 39; *Patapsco Ins. Co.* v. *Southgate et al.,* 30 U. S. 604; *Bradlie and Gibbons* v. *Maryland Ins. Co.,* 37 U. S. 378; *Orient Mutual Ins. Co.* v. *Adams,* 123 U. S. 67).

The Cause Below

On June 7, 1938, petitioner, a Connecticut corporation, for stated premiums duly paid, issued two marine insurance policies to respondent, a New Jersey resident (R. 311), insuring him against loss or damage to his yacht "Dauntless" for one year commencing June 24, 1938. The home port of the "Dauntless" was Boothbay Harbor, Maine (R. 1722). The policies were countersigned by petitioner at Boston, Mass. (R. 29, 40). Policy No. Y8565 was on hull and machinery (R. 22-9) and policy No. Y8566 on disbursements (R. 36-40).

The hull policy Y8565 insured respondent against loss or damage by marine perils to the "hull, spars, sails and tackle and apparel, materials, fittings, boats * * * furniture * * * stores, supplies * * * refrigerating and electric light plans and installation and all machinery, boilers, engines, etc." of the "Dauntless" at an agreed value of $240,000.

In addition to provisions (R. 22-4) which the Circuit Court of Appeals referred to as couched in "the traditional language of the admiralty" (R. 1934), the hull policy contained clauses reading as follows:

> "* * * *The insured value to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss"* (R. 25).
>
> "Warranted by the assured that the within named vessel shall be laid up and out of commission at the Thames Ship Yard, New London, Connecticut during the currency of this policy" (R. 26).

The disbursement policy Y8566 insured respondent against loss or damage by marine perils "on disbursements and/or shipowners' liability as below, of Aux. Diesel Schooner *'Dauntless'* for $80,000". This policy contained the same "traditional language of the admiralty" as the hull policy and also the following, among other clauses:

> "* * * *A total and/or constructive total loss paid by Underwriters on hull to be a total loss under this Policy"* (R. 37).
>
> "Warranted laid up and out of commission at the Thames Ship Yard, New London, Conn. during the currency of this Policy" (R. 40).

Because of their importance, photostatic copies of the original policies are annexed hereto, the hull policy being marked Appendix "A" and the disbursement policy Appendix "B".[1]

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[1] These policies (Appendices "A" and "B") are on the usual marine insurance policy forms and include clauses never found in any other type of insurance. The clause enumerating the perils insured against is practically identical with that in Lloyd's policy as printed in Arnould on Marine Insurance, Vol. I, Sec. 10, p. 17 (12th Ed.). Any variance from Lloyd's form is due to the fact that in the hull policy (Appendix "A") respondent warranted the vessel "free from capture, seizure, arrests", etc. Having been prepared by petitioner on its own printed forms, the policies should be strictly construed against it (*Phoenix Ins. Co.* v. *Slaughter*, 79 U. S. 404; *Noonan* v. *Bradley*, 76 U. S. 394).

The "Dauntless" was thereafter towed from Perth Amboy, N. J., to New London, Conn., and moored alongside a pier of the Thames Ship Yard "out of commission" and withdrawn from active use because of respondent's ill health. The respondent intended to use her as a yacht the following year (R. 314). She remained waterborne and did not lose her identity as a vessel while out of commission. Her diesel engine was opened up for the inspection of Lloyd's surveyor (R. 230); repairs were made to her rudder (R. 182, 523, 1463); her Steamboat Inspectors' licenses were kept in force (R. 509-10); and her classification was continued by Lloyd's Register (R. 617). She could have been put into service in a short time had respondent's health permitted him to use her (R. 1467).

On September 21, 1938, while the "Dauntless" was thus properly moored at the Ship Yard's pier and during the term of the said policies (R. 102), she was struck by a hurricane which broke most of her lines, caused other lines to pull out a portion of the pier and cast her adrift so that she was driven ashore by the wind and waves, where she finally fetched up with her bow impaled on hulks of wrecked barges, with her stern projecting at an angle into mud and shallow water. Water entered her hull, submerging her engines, generators, machinery and auxiliary appliances, and flooding her dining salon, library, cabins and other portions of her interior. A pier shed, in which the yacht's lines, gear, linen, bedding and other furnishings and equipment (covered by the hull policy, Appendix "A") were stored, was torn from its foundations by the hurricane and swung around into the bay where its contents were recurrently submerged by the tides and so damaged as to become a total loss (R. 1907-8). The damage was admittedly caused by perils insured against by the policies (R. 54).

Respondent promptly notified petitioner of the disaster, personally examined the "Dauntless" and also had her examined by competent marine advisors, including her designer and supervisor of construction, and as a result

thereof became convinced that she was a constructive total loss and abandoned her to petitioner on September 29, 1938, but petitioner declined to accept such abandonment (R. 323, 1586-7, 1933). Petitioner eventually salvaged the yacht and returned her to the Ship Yard's pier, after which surveys were held and specifications for repairs were agreed to and submitted to repair yards for bids. Independent surveys were also had of the damaged rigging, furniture and batteries, not included in the specifications. Respondent then filed his claim with petitioner for the full amount of both policies, plus certain sue and labor expenses, and, when his claim was declined, filed his libel therefor, resulting in decisions of the District Court (32 F. Supp. 409; R. 80-1, not officially reported; 40 F. Supp. 404) in his favor, affirmed by the Circuit Court of Appeals (1942 A. M. C. 1021, not yet officially reported), referred to more fully in our initial statement.

ARGUMENT

POINT I

The courts below correctly ruled that the cause was within admiralty jurisdiction.

Petitioner makes the unfair statement that the Circuit Court of Appeals disposed of this question of jurisdiction "rather casually by treating it as a mere matter of nomenclature" (brief, 12). Nothing could be further from the fact. Following the three sentences of the opinion quoted by petitioner (brief, 12), the Court continued for more than three printed pages to discuss this question in a logical and well-reasoned decision during which it (1) analyzed the terms of the policies and the marine risks covered thereby (R. 1934); (2) traced the development of admiralty jurisdiction over marine insurance contracts in the United States, beginning with the learned and exhaustive opinion

of Mr. Justice Story on circuit in 1815 in *De Lovio* v. *Boit*, 7 Fed. Cas. 418, No. 3776, which this Court later said "has never been answered, and will always stand as a monument of his great erudition" (*New England Marine Ins. Co.* v. *Dunham*, 11 Wall. 1, 35), continuing with this Court's decision in 1851 in *New England Marine Ins. Co.* v. *Dunham*, *supra*, and ending with a group of cases in the United States District Courts and Circuit Courts of Appeals during the seventy-one years since 1851 which accepted "admiralty jurisdiction simply on the ground that the Supreme Court in the *Dunham* case had settled the issue" (R. 1936); (3) discussed petitioner's contention that language in *De Lovio* v. *Boit*, *supra*, and in *New England Marine Ins. Co.* v. *Dunham*, *supra*, referring to contracts of which admiralty has jurisdiction as those relating "to the navigation, business or commerce of the sea", was restrictive in character, and held that they were not terms of limitation *qua* marine insurance and that in any event the words "business or commerce of the sea" would cover insurance against sea perils, "whether the insured ship be loaded or unloaded, moving or laid up" (R. 1936); (4) pointed out that the circumstances of the "Dauntless" being laid up and out of commission as warranted merely decreased the *quantum* of risk and not the type of risk which remained maritime in nature (R. 1934-5); (5) discussed petitioner's suggested analogy of "other types of contracts where distinctions have been made between ships engaged in active service and ships laid up" and declined to apply it because "these distinctions** are generally unreal and their continued life rests on their settled nature, not on their merit. See *Thames Towboat Co.* v. *The Francis McDonald*, 254 U. S. 242, 244", concluding, "We see no value in erecting another set of unreal distinctions here, when it can be demonstrated that the contract in issue fairly fits the original rule laid down" (R. 1937).

Petitioner in the Circuit Court of Appeals made the same arguments as it makes in Point I of its petition and brief

and cited the same cases, and it is difficult to see how the Court below could have reached a different conclusion.[2] In *New England Marine Ins. Co.* v. *Dunham,* 11 Wall. 1, this Court established admiralty jurisdiction of marine insurance policies as maritime contracts in the broadest terms as had Mr. Justice Story in *De Lovio* v. *Boit,* 7 Fed. Cas. 418, No. 3776. Language used in these cases and not quoted by petitioner either before the Courts below or in its petition herein indicates that the reason for holding a marine insurance policy to be a maritime contract was because it insured a vessel or cargo against marine risks. In *De Lovio* v. *Boit, supra,* Mr. Justice Story said.

> *"There is no more reason why the admiralty should have cognizance of bottomry instruments, as maritime contracts, than policies of insurance. Both are executed on land and both intrinsically respect maritime risks, injuries and losses"* (p. 444).

And this Court said in *New England Marine Ins. Co.* v. *Dunham, supra,* in drawing an analogy between contracts of affreightment on the one hand and marine insurance contracts on the other:

> *"The object of the two contracts is, in the one case, maritime service, and in the other maritime casualties"* (p. 30).

Marine risk is the subject matter of a contract of marine insurance and petitioner's contention to the contrary (brief, 18) is unsound.

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[2] In the District Court, Bondy, D. J., denied the motion to dismiss the libel in an unreported memorandum opinion reading as follows:

> "The object insured was a vessel which had never lost its identity as a vessel. Moreover the risks against which it was insured, were perils of the sea, maritime in nature. The loss was the result of a maritime disaster caused by an hurricane. The Court therefore is of the opinion that the Admiralty Court has jurisdiction notwithstanding that the policies provided that the yacht *Dauntless* should be laid up and out of commission for one year, the term of the policies. See Insurance Co. v. Dunham, 11 Wall. 1" (R. 80-1).

Petitioner's statement (brief, 17) that marine insurance is written on bridges, piers, wharves, etc., but that no one could conceivably argue that such a policy was a maritime contract is immaterial, if true. The "Dauntless" was a maritime *res,* waterborne and still a maritime subject though laid up and out of commission. Moreover, no bridge or wharf could be subject to all the perils covered by the policies herein (Appendices "A" and "B", *infra*). *Cope* v. *Vallette,* 119 U. S. 625 (brief 6, 17), has no significance. The drydock was not subject to salvage charges because it was not maritime property such as a ship or its cargo. As salvage is *sui generis* and known only to admiralty, the question was one of lack of jurisdiction only because there was no cause of action in any court.

Until petitioner's motion below before Bondy, D. J., the *Dunham* decision was given the broadest interpretation by bench and bar and its doctrine was held to be unrestricted and unfettered.[3] To change the rule now would lead to confusion and increase litigation.

North Pacific Steamship Co. v. *Hall Bros.,* 249 U. S. 119, 125, is cited by petitioner (brief, 13) as authority for the

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[3] In *The Iris,* 100 F. 104, 113, the United States Circuit Court of Appeals for the First Circuit said:

> "The decision in Insurance Co. v. Dunham, 11 Wall. 1, 20 L. Ed. 90, which held that a marine insurance policy is a maritime contract, and within the jurisdiction of the admiralty courts of the United States, *threw off all fetters, and left all questions of this class to be determined on general and harmonious principles.*"

See also cases cited in the Circuit Court of Appeals opinion herein (R. 1936), especially *St. Paul F. & M. Ins. Co.* v. *Pacific Cold Storage Co.,* 157 F. 625, 629, 631 (C. C. A. 9). In this case the Court, citing *Insurance Co.* v. *Dunham,* 11 Wall. 1, overruled a marine underwriter respondent's exception to admiralty jurisdiction of a cause by its insured (owner of cargo shipped on a river vessel) for sue and labor expenses incurred in carrying the cargo forward by land in order to save it from marine perils insured against after the vessel stranded. The underwriter's exception was based on the fact that these expenses were incurred "on land" to save the cargo alone.

statement that the sole test of admiralty jurisdiction is whether the contract relates to the "navigation, business or commerce of the sea". However, in that case this Court, citing *New England Marine Ins. Co.* v. *Dunham, supra,* as authority, held that admiralty had jurisdiction of a suit on a contract for repairs to a wrecked and laid up vessel irrespective of whether the repairs were made "while she is afloat, while in drydock, or while hauled up by ways upon land. *The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all*".[4] The same reasoning applies to contracts of marine insurance, and admiralty has jurisdiction thereof, whether the vessel be in actual navigation or be "laid up and out of commission" at the time of the accident, since the marine nature of the risks insured is identical.

The tendency of this Court since *New England Marine Ins. Co.* v. *Dunham, supra,* has been to extend, rather than to restrict, admiralty jurisdiction. In *New Bedford Drydock Co.* v. *Purdy,* 258 U. S. 96, 99, in determining whether a contract was for ship construction, of which admiralty has no jurisdiction, or for ship repairs, of which it has jurisdiction, this Court declined "to enlarge the compass of the rule approved in *Thames Towboat Co.* v. *The Francis McDonald*" (254 U. S. 242), stating that "*reasonable doubts concerning the matter should be resolved in favor of the admiralty jurisdiction*". Likewise, in *Krauss Bros. Lumber Co.* v. *Dimon Steamship Corp.,* 290 U. S. 117, 124, this Court reversed the decrees below and held that admiralty

[4] See also *The Harvard,* 270 F. 668 (D. C., E. D. N. Y.) and *The V-14813,* 65 F. (2d) 789 (C. C. A. 5), holding that admiralty has jurisdiction of a contract for repairs to a vessel even while "laid up", and that there is a lien therefor where the services are for the vessel's benefit. *The V-14813* was not overruled by *Kibadeaux* v. *Standard Dredging Co.,* 81 F. (2d) 670, as contended by petitioner (brief, 13). The *Kibadeaux* case was for personal injuries where the place of the injury and not the subject matter controls, and whatever was said by the Court with reference to *J. C. Penney-Gwinn Corporation* v. *McArdle,* 27 F. (2d) 324, is *dictum.* Also see *Kilb* v. *Menke,* 121 F. (2d) 1013 (C. C. A. 5), where the same Court sustained admiralty jurisdiction of a libel for possession of vessels that had been tied up and out of commission for almost four years.

had jurisdiction of a cause both *in rem* and *in personam* for repayment of excess freight made by a shipper under mistake of fact, and dismissed respondent's contention that the action was essentially a common law suit for money paid out and received, of which admiralty had no jurisdiction, with these words, "*Admiralty is not concerned with the form of the action, but with its substance*".

The cases cited by the petitioner in support of their alleged analogy with the cause herein (brief, 13-16) are distinguishable because the question before the courts was whether or not the *service* performed was maritime, not whether a risk was maritime. Winter storage of grain on a ship anchored and laid up for the winter season is no more a maritime service than storage in a warehouse, for which it is a substitute. Wharfage, watchmen, use of a vessel for a floating hospital or quarantine station, supplies furnished to a "laid up" ship, etc., are not maritime services since they do not benefit the business of transportation and navigation and are, therefore, not necessaries for that business.[5]

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[5] It seems hardly necessary to discuss petitioner's argument (brief, 15, 16) that, because a contract for building a ship is non-maritime (*Thames Towboat Co.* v. *Schooner Francis McDonald,* 254 U. S. 242), therefore a contract to insure an existing ship that is "laid up" should be held non-maritime. The reason that shipbuilding contracts have been held non-maritime is because the vessel does not become a ship in the legal sense until it is completed (*Tucker* v. *Alexandroff,* 183 U. S. 424, 438; *North Pacific S. S. Co.* v. *Hall Bros., etc.,* 249 U. S. 119, 127). The vessel once built, however, remains a vessel "subject to admiralty jurisdiction" until she is abandoned as no longer practically capable of use as a vessel. The *Dauntless* was not a hulk or dismantled or abandoned as incapable of use as a vessel before the hurricane struck her. A charter of a laid-up vessel is maritime if it is afloat and capable of navigation (*Kenny* v. *City of New York* (C. C. A. 2), 108 F. (2d) 958). In *New Bedford Dry Dock Co.* v. *Purdy,* 258 U. S. 96, 99, this Court declined "to enlarge the compass of the rule approved in *Thames Towboat Co.* v. *The Francis McDonald", supra.* It is respectfully suggested that this was because, like the Circuit Court of Appeals in the cause below, this Court could "see no value in erecting another set of unreal distinctions here" (R. 1937).

As yachts in our northern waters, which are ordinarily navigated during the spring and summer months only and laid up during the winter, are insured under time policies, ordinarily a year in length, which provide for a lay-up period at reduced rates, petitioner's contention, if followed, would lead to the absurd result that admiralty would have jurisdiction of a suit for marine losses during the summer months but not for similar losses during the winter months. Such an absurdity should not be presumed (*Church of the Holy Trinity* v. *United States,* 143 U. S. 457, 459). As the Circuit Court of Appeals observed, the practice of providing for lay-up periods of yachts is "hardly an attempt to divide the year into maritime periods and non-maritime periods" (R. 1934).

The correct rule is that petitioner's contract is to be determined by its subject matter—insurance against marine risks and casualties—which makes it subject to admiralty jurisdiction. The marine risk remains of the same nature irrespective of whether the vessel is "laid up and out of commission" or in service; the only difference is one of degree. In both cases, admiralty has jurisdiction because the nature of the risk is identical. This is the general rule laid down by *Insurance Co.* v. *Dunham,* 11 Wall. 1, in marine insurance; by *North Pacific Co.* v. *Hall Bros.,* 249 U. S. 119, in ship repair contracts; by *Kenny* v. *City of New York,* 108 F. (2d) 958 (C. C. A. 2), in charter party cases; by *Treworgy et al.* v. *Richards et al.,* 10 F. (2d) 152 (C. C. A. 1), in salvage cases; by *C. H. Northam,* 181 F. 983 (D. Mass.), in limitation of liability cases; and by *Kilb* v. *Menke,* 121 F. (2d) 1013 (C. C. A. 5), in petitory and possessory cases. The Courts below were right in following that rule. They did not misconstrue the decision of this Court in *Insurance Co.* v. *Dunham, supra,* nor do their decisions "sweep aside all tests" heretofore applied by this Court and the lower Federal Courts throughout the country as petitioner alleges (brief, 18). On the contrary, their decisions are amply supported by reason and au-

thority. They are not in conflict with the Circuit Court of Appeals for the Seventh Circuit in *North German Fire Insurance Co.* v. *Adams,* 142 F. 439, as alleged by petitioner (brief 6, 17), nor are they in conflict with any other circuit. The Court in the *North German Fire Insurance Co.* case, *supra,* sustained admiralty jurisdiction of an action on a policy for fire only on a ship as a maritime contract within *Insurance Co.* v. *Dunham, supra,* although it did not cover full marine perils, saying:

> "The subject-matter is alike insurance upon waterborne property against one of the risks incident to its service in navigation" (p. 441).

As we have seen, the "Dauntless" was waterborne and the policies covered the risks incident to her being waterborne.

POINT II

The Courts below correctly applied the well-established American 50% rule in determining that there had been a constructive total loss of the yacht. This in effect was provided for by the policies and in no way worked unjust enrichment.

All discussion of the English rule of constructive total loss, allowing an insured to abandon the *res* to his underwriter only where the cost of recovery and repair exceeds the repaired (or agreed) value, is irrelevant because the policies were American contracts and the American rule applied. There can be no question that the American rule of constructive total loss allows abandonment where the cost of recovery and repair exceeds 50% of the repaired (or agreed) value (*Marcardier* v. *Chesapeake Ins. Co.,* 8 Cranch. 39, 47, 12 U. S. 39; *Patapsco Ins. Co.* v. *Southgate et al.,* 30 U. S. 604; *Bradley and Gibbons* v. *Maryland Ins. Co.,* 37 U. S. 378; *Orient Mutual Ins. Co.* v. *Adams,* 123 U. S. 67; *Royal Exch. Assur.* v. *Graham & Morton Transp.*

Co., 166 F. 32; *Arnould on Marine Ins.*, 12th Ed., 1939, par. 1117). The Courts below applied these authorities and, finding that the cost of repair exceeded 50% of the agreed value of the yacht in the policies, awarded a decree to the respondent for a total loss under both policies (Opinion of Coxe, D. J., 32 F. Supp. 409, 411; Clancy, D. J., 40 F. Supp. 404, 410; Circuit Court of Appeals R. 1937, 1939, 1940).

Petitioner's position in criticizing this aspect of the decisions below is based upon two premises, both of which must be proved in order to sustain its conclusion. These premises are (1) that the American "50 percent rule applies only to those cases in which the damage occurs and abandonment is tendered short of destination" so that an owner cannot abandon his vessel and claim a constructive total loss after she reaches destination, even though her insurance is still in force at the time of abandonment, unless he shows that the cost of restoring her would be greater than her restored or agreed value; and (2) that the "Dauntless" being laid up and out of commission as warranted in the policies was constructively always at her destination, since she could not be moved under the warranty, and therefore could not be abandoned as a constructive total loss except upon a showing that her cost of restoration exceeded her insured value. The courts below declined to accept petitioner's conclusion, having found both premises unsupported in law or fact.

The authorities cited by petitioner at page 20 of its brief in support of its first premise are not in point since each involved a policy on cargo for a specified voyage rather than for a term and abandonment was made after the insurance had expired by reason of the voyage having ended. These authorities hold nothing more than that abandonment to an underwriter in order to be effective as a basis for claiming a constructive total loss must be made promptly upon learning of the loss, which is in accordance with the rule as summarized by Chancellor Kent (III Commentaries, p. 419 [9th Ed.]).

Ruckman v. *Merchants' Louisville Ins. Co.*, 5 Duer 342, 362, cited by petitioner (brief, 20), holds only that the moiety rule in constructive total loss situations on vessels grew out of the similar rule on cargo and is to be limited thereto.

Petitioner's statement (brief, 27) that *Marcardier* v. *Chesapeake Ins. Co.*, 8 Cranch. 39, 12 U. S. 39, limited the 50% rule to cases where the damage occurred short of the port of destination is unfounded. That case, considered by the Circuit Court of Appeals below (R. 1938), affirmed a decision for the defendant on the ground that the loss had not been shown to exceed "a moiety of the value". Likewise, *Seton* v. *Delaware Ins. Co.*, 21 Fed. Cas. (12675), contains no such limitation upon the 50% rule as petitioner (brief, 26, 27) claims. Mr. Justice Washington there refused to permit recovery for a constructive total loss of specie which was removed from the ship and replaced by other articles which were carried safely to destination.

Petitioner's reliance in support of its premise is based principally upon its interpretation of *Pezant* v. *National Ins. Co.*, 15 Wend. 453, decided by an intermediate appellate New York State court in 1836, a decision which has never received the sanction of any other court. In that case a ship, insured for a term, reached her port of destination, where her owners resided, and abandonment was there tendered on the ground that damages sustained during the voyage exceeded 50%. The Court denied recovery on the ground that the net expenses, after crediting general average contributions, were less than 50%. In what appears to be a dictum, it also held that, having safely reached her home port in repairable state before abandonment was tendered, the owners could recover only a partial loss.

Upon this slender authority petitioner has developed its elaborate argument that the 50% rule applies only when the ship is navigating in distant waters or is at a foreign port.

The Circuit Court of Appeals considered the *Pezant* case carefully and correctly concluded that it "is a strange

phenomenon, not fitting into the general pattern of marine insurance law" (R. 1937-9). It observed that the exception in the *Pezant* case was taken from *Marshall on Insurance*, which, in so far as term insurance is concerned, limited the rule to cases where the term had expired (R. 1938), which was the basis on which *Peters* v. *Phoenix Ins. Co.*, 3 Serg. & R., Pa., 25, "repudiated the Pezant exception"; also that the cases cited by Marshall did not support the exception (R. 1938).

It may be further observed that the dictum in the *Pezant* case rests upon a confusion between marine insurance for a period of time and insurance for a voyage, so that the Court treated the time policy as if it were a voyage policy.[6]

[6] In olden days a marine insurance policy usually covered a ship for a voyage rather than for a term, which gave rise to the fallacy that a hull policy insured both the ship and the voyage and that, if either the ship or the voyage was saved, there could be no abandonment for a constructive total loss. See, for example, *Hamilton* v. *Mendes* (1761), 2 Burr, 1198, 1209, discussed in 2 *Arnould, Marine Inurance* (12th Ed.), Section 1104. In that case Lord Mansfield, as Arnould points out, "gave great weight to a circumstance which, it is now settled, must be altogether out of consideration in determining whether the loss on the ship is or is not constructively total—viz., whether, in consequence of the casualty, there had or had not been a loss of the voyage". Arnould states that such a consideration was pertinent in relation to wager policies which were in reality nothing but wagers on the success of the voyage, but that in policies on ships "the insurance is not on the voyage, but on the ship for the voyage". In all cases of loss under such a policy, the question is how much damage is done to the ship, and not how much damage the assured has sustained by the interruption of the voyage. Lord Mansfield's error was corrected later, however, and from 1810 on it has been settled in England that the loss of the voyage has nothing to do with the loss of the ship. See, for example, *Falkner* v. *Ritchie* (1814), 2 M. & S. 290. The same principle, Arnould states, "has received abundant judicial illustration, and may be regarded as conclusively established, in the insurance law of the United States" (Sec. 1104), citing *Bradlie and Gibbons* v. *Maryland Ins. Co.*, 37 U. S. 378, 9 L. Ed. 1123; *Hurtin* v. *Phoenix Ins. Co.* (C. C., D. Pa.), 12 Fed. Cas. No. 6,941; *Alexander* v. *Baltimore Ins. Co.*, 8 U. S. 370, 2 L. Ed. 650. Possibly Judge Bronson, in the *Pezant* case, followed Lord Mansfield's error referred to by Arnould.

Petitioner adroitly creates a rule of law out of the fortuitous circumstance that most of the cases dealing with the 50% rule of constructive total loss arose from disasters on the high seas or in distant places. From this it deduces that the 50% rule is limited to disasters in distant waters, but it cites no authority except its own interpretation of the *Pezant* case, together with a quotation (brief 24) of colorless language from *Phillips on Insurance,* Sec. 1555, stating that *"The better doctrine seems to be * * * "* that of the *Pezant* exception. *Parsons on Marine Insurance II,* p. 128, cited (brief 20) is even less enthusiastic than *Phillips* concerning the exception, saying, *"There seems to be but one limitation or exception to the rule of 50 percent although even this may not be entirely certain; it is that if the vessel actually performed the voyage insured,* and reached her terminus ad quem, there can be no abandonment of her merely because she needs repairs from perils insured against, which will cost more than half her value"[7]

Moreover, it would seem that the *Pezant* case, in so far as its dictum regarding the exception to the 50% rule is concerned, was overruled by the same Court at the same term in *American Ins. Co.* v. *Ogden,* 15 Wend. 532. This was a suit for a constructive total loss of a vessel insured under a term policy of six months. It was argued that she had reached her destination before abandonment, but the owners were given judgment in an opinion which stated:

> "The circumstance of St. Thomas being the port of destination of that particular voyage seems to have been thought of consequence * * *, whether it would be so or not, I need not inquire, as the policy in this case was *on time* and the time only half expired" (p. 540). (Emphasis by the Court.)[8]

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[7] It is to be noted that Parsons makes the exception apply merely to a voyage policy and not a term policy.

[8] While the exact dates of the decisions are not given in the reports, their position in the printed volume (*American Ins. Co.* at p. 532, and *Pezant* v. *National Ins. Co.* at p. 453 of 15 Wend.) gives rise to a reasonable presumption that the *American Ins. Co.* case was decided after the *Pezant* case.

This case was reversed on other grounds (20 Wend. 287), namely, because the Appellate Court found that "there was no evidence to show that the damage amounted to half the value of the vessel" (p. 306) and also that the vessel's sale was due to culpable negligence of the owner.

Petitioner's second premise is absolutely devoid of proof or authority. To argue that the "Dauntless" was at her destination because she was laid up and out of commission as warranted is absurd. Such an argument would deprive respondent of any right to abandon for a constructive total loss under the American 50% rule, in any event, for the mere reason of compliance with the warranty, in spite of the provision in the hull policy that "the insured value [is] to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss" (Appendix "A") and the provision in the disbursement policy that "a constructive total loss paid by underwriters on hull to be a total loss under this policy" (Appendix "B"). As the Circuit Court of Appeals said: "When constructive total loss" was used in the policies involved in this suit the parties hardly visualized the Pezant exception as part of the rule. "They undoubtedly thought of the 50% rule as governing" (R. 1939).

The policies are American contracts, executed in the United States, on a yacht of American registry, by an American insurance company, for an American yacht owner, the premiums and values being stated in American dollars. Their terms are clear and unambiguous and insure the risk of a constructive total loss under both policies under the American rule. Had appellant desired to establish a different basis for such a loss, it would have written a different contract, providing, for instance, that it would only be recognized when the damages exceeded, say, 75% or 100% of the $240,000. Not having done so, it is bound by the American 50% rule.

As the Circuit Court of Appeals said:

> "To give currency to this peculiar exception expounded in the *Pezant* case would result in many diffi-

> culties in connection with time policies. Shipowners would be without the ordinary privilege of abandonment if their ships happened to be in port when damaged. And where, as here, the ship was not to be moved, abandonment under the American rule would not exist. We believe the *Pezant* case is not consistent with the general rules of constructive total loss. The American rule is the moiety rule, and applies wherever the ship is when damaged" (R. 1939).

Moreover, the factual condition which gave rise to the exceptional doctrine of the *Pezant* case is absent here. The Court's refusal to apply the 50% rule was based upon the fact that the insured did not tender abandonment until *after* the vessel had arrived home in a repairable state and was moored in safety. No comparable situation exists in the present case. Here the respondent tendered abandonment eight days after the hurricane disaster, while the "Dauntless" lay wrecked and stranded a considerable distance from Thames Shipyard, and over six weeks *before* petitioner salvaged her (R. 1885, 1886). The ground of the *Pezant* case was that the peril had passed when abandonment was tendered. In the present case the "Dauntless" was in grave peril when respondent abandoned, as her designer, who inspected her with respondent, testified:

> "The vessel was in a dangerous position, naturally. She was partly landborne and partly waterborne" (R. 806). "That is the worst spot a boat can be in" (R. 811).

Petitioner's plea, addressed to the "injustice of the rule" (brief 25), is beside the point.[9] The question in this case

[9] It is indeed strange that petitioner should be the party to cry "injustice". The District Court found that petitioner itself attempted to defraud respondent of his rights under the policies by secretly persuading the low bidder on repairs to submit its extremely low bid by promising to indemnify it to the extent of $10,000 to take care of any excess cost (R. 1895). The trial judge refused to give any attention to this bid "except to reflect that its production leaves a taint on the defense" (R. 1896). The Circuit Court of Appeals said, "We think it was reasonable to exclude this bid under these circumstances" (R. 1940).

is the application of the rule, not the result of it. Its argument that the 50% rule "violates the fundamental concept that insurance is a contract of indemnity" (brief 25) rests upon a false hypothesis.

In the leading case of *Irving* v. *Manning*, 6 C. B. 391, 1 H. L. C. 286, the House of Lords held that a marine insurance policy is not a mere contract of indemnity in respect of constructive total loss. In that case a vessel was valued in the policy at £17,500 but was worth only £9,000 when the policy was issued and also in repaired state after being damaged by perils of the sea. Holding that the market value of £9,000 in repaired state was the correct standard for ascertaining a constructive total loss and that the insurer was liable for the full amount of £17,500, the House of Lords said:

> "It is argued that this course of proceeding infringes on the generally-received rule, that an insurance is a mere contract of indemnity; for, thus the assured may obtain more than a compensation for his loss: and it is so.
>
> "A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as, indeed, they may in any other contract to indemnify" (p. 422).

POINT III

The courts below were not bound to follow the decision in *Pezant* v. *National Insurance Co.*, 15 Wend. 453, under the doctrine of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and *Just* v. *Chambers*, 312 U. S. 383.

In reliance upon the assumption that its interpretation of the *Pezant* case states the law of New York State and is controlling here, petitioner has developed an elaborate but unsound argument that the courts below decided the

present case in conflict with *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and *Just* v. *Chambers*, 312 U. S. 383. Its premises and conclusion are equally fallacious.

(1) New York law was not the law of the contract.

The petitioner was a Connecticut corporation (Appendices "A" and "B"), the respondent a resident of New Jersey (R. 311), and the yacht, whose home port was Boothbay Harbor, Maine (R. 1722), was covered by the policies and suffered the loss at New London, Conn. (R. 1885), and was not in New York at any time during the policy period. The trial court found that "the policies in suit here were countersigned at Boston, Massachusetts, and their validity is conditioned upon countersignature. They were issued to one Alden, a Massachusetts broker, whose sticker appears on the back of each policy. The libellant's premiums had been sent to Mr. Alden for payment. We would be inclined to call them Massachusetts contracts" (R. 1901).

Petitioner's counsel asked the trial judge to apply the Massachusetts law and he held that law to be "not different" from that of the federal courts sitting in admiralty on constructive total loss (R. 1901). And see argument of petitioner's counsel at conclusion of the trial in which he stated that if the case "were on the common law side of the Court there would be no question that this Court would be bound to apply the Massachusetts law under the decision of the Supreme Court in the *Erie Railroad* v. *Tompkins* case" (R. 1534).

Petitioner's brief in the Circuit Court of Appeals at page 8 stated that "these policies were Massachusetts contracts" and that "Massachusetts decisions would be controlling in the courts of New York and consequently in a common law action in the Southern District of New York, since it is the law of New York that contracts will be interpreted and enforced according to the law of the jurisdiction where the contract was made. *Klotz* v. *Angle*, 220 N. Y. 347, 355."

There was, therefore, "allegation" and "proof" (brief, 28) by petitioner itself that the contracts were governed by the

law of the State of Massachusetts, which the trial court found to be no different than that of the federal courts in admiralty. The fact that suit was brought in admiralty in the United States District Court for the Southern District of New York was for the purpose of convenience and has no possible legal significance as to the law to be applied other than the uniform rules of admiralty.

Moreover, as the point that the New York local law controlled under *Erie Railroad* v. *Tompkins* was not raised below, it should not now be heard on this petition. *Steam Tug Quickstep* v. *Byrne,* 9 Wall. 665; *Little* v. *Barreme,* 6 U. S. 170, 179; *Morrill* v. *Jones,* 106 U. S. 466; *De Rodriguez* v. *Vivoni,* 201 U. S. 371, 377.

(2) *Pezant* v. *National Insurance Co.*, 15 Wend. 543, does not establish New York law.

The *Pezant* case was decided by an intermediate appellate court and has never received approval or mention by the Court of Appeals of New York State. Moreover, it would appear to have been overruled, in so far as the alleged exception to the American 50% rule is concerned, by a subsequent case in the same court. See *American Ins. Co.* v. *Ogden,* 15 Wend. 532, discussed *supra,* p. 16.

(3) Admiralty having jurisdiction of the cause, the decisions of the courts sitting in admiralty are controlling, independent of the local law, whether statutory or set up by judicial decision. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Union Fish Co.* v. *Erickson,* 248 U. S. 308; *Northern Coal and Dock Co.* v. *Strand,* 278 U. S. 142; *John Baizley Iron Works* v. *Span,* 281 U. S. 222.

Policies of marine insurance are maritime contracts and it is as essential that they be interpreted according to the uniform principles of admiralty law as the contracts and liability of repairmen in *Baizley Iron Works* v. *Span, supra,* and stevedores in *Northern Coal and Dock Co.* v. *Strand, supra.*

The cause is not one of local concern and subject to local law, as is suggested by petitioner (brief, 32), but if it were, the applicable local law would be that of Massachusetts and not that of New York.

We deem it unnecessary to dwell at length upon petitioner's hypothetical argument that the doctrine of *Erie Railroad* v. *Tompkins* should be extended to require courts of admiralty to adopt the decisions of lower courts of the state where the admiralty forum is situated. It is sufficient to note that *Erie Railroad* v. *Tompkins* is founded upon the absence of constitutional authority for the establishment of a Federal common law. *Per contra,* the Constitution specifically provides for the establishment of a general and uniform system of maritime law administered by courts of admiralty. *The Lottawanna,* 21 Wall. 558; *Workman* v. *New York City,* 179 U. S. 552; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 216; *Union Fish Co.* v. *Erickson,* 244 U. S. 308; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 160.

Petitioner's effort to extend the doctrine of *Erie Railroad* v. *Tompkins* into the field of general maritime law overlooks the fundamental distinction between the two systems of law. Its argument that, because a state statute, granting a right of recovery for personal injuries, notwithstanding claimant's death, is enforceable in admiralty through a method of benevolent adoption (*Just* v. *Chambers,* 312 U. S. 383), a court of admiralty is therefore compelled to adopt the views of an inferior appellate state court in matters involving the general maritime law of marine insurance contracts, is a complete *non sequitur.*

The reason for the divergence between state and federal court decisions, cited by petitioner (brief, 31), is that courts of admiralty follow a uniform system, undisturbed by conflicting opinions of state courts in matters affecting contracts of marine insurance. The conflicts, cited by petitioner (brief, 30-31), clearly demonstrate the utter confusion and lack of uniformity which the general maritime law of marine insurance would suffer if courts of admiralty were compelled to follow divergent state court decisions.

FINAL POINT

Six federal judges in four separate hearings have found petitioner's arguments unsound. The petition presents no question of public importance or any other question requiring this Court to review the decision of the Circuit Court of Appeals and should be denied.

Respectfully submitted,

GEORGE C. SPRAGUE,
JOHN TILNEY CARPENTER,
Counsel for Respondent.

New York, N. Y., September 11, 1942.

(Emphasis throughout ours unless otherwise noted.)

Form C (3-1-1934) Dated June 7th, 1938

In consideration of an additional premium of $ 360.00 being at the rate of 15% this endorsement is attached to and made part of Policy No. 8565 issued by the AETNA INSURANCE COMPANY, of the ÆTNA FIRE GROUP, Hartford, Connecticut.

Issued to R. C. Jeffcott

PROTECTION AND INDEMNITY CLAUSE

And we further agree that if the Assured shall by reason of his interest in the insured ship (or boat) become liable to pay and shall pay any sum or sums in respect of any responsibility, claim, demand, damages, and/or expenses or shall become liable for any other loss arising from or occasioned by any of the following matters or things during the currency of this Policy in respect of the ship (or boat) hereby insured, that is to say:—

Property Damage (I) Loss of or damage to any other ship or boat or goods, merchandise, freight or other things or interests whatsoever, on board such other ship or boat, caused proximately or otherwise by the ship (or boat) insured in so far as the same is not covered by the running down clause of the Hull Policy:

Loss of or damage to any goods, merchandise, freight or other things or interests whatsoever other than as aforesaid, whether on board said ship (or boat) or not, which may arise from any cause whatever:

Loss or damage to any harbor, dock (graving or otherwise), slipway, way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or movable thing whatsoever, or to any goods or property in or on the same, howsoever caused:

Any attempted or actual raising, removal or destruction of the wreck of the insured ship or the cargo thereof, or any neglect or failure to raise, remove or destroy the same:

we will pay the Assured such proportion of such sum or sums so paid, or which may be required to indemnify the Assured for such loss, as the sum insured under this Policy on Hull bears to the Policy value of the ship (or boat) hereby insured; **provided** always that the amount recoverable hereunder in respect to any one accident or series of accidents arising out of the same event shall not exceed the sum hereby insured under this Policy on the Hull;

Personal Injury (II) Loss of life or personal injury and payments made on account of life salvage,

we will pay the Assured such proportion of such sums so paid or which may be required to indemnify the Assured for such loss as the sum insured under this Policy on Hull bears to the Policy value of the ship (or boat) hereby insured, **provided** always that the liability of this Company for claims on account of loss of life and/or personal injury and/or on account of life salvage is limited to its proportional part of $ 50,000. in respect to any one person and, subject to the same limit for each person, to its proportional part of $ 240,000. in respect to any one accident or series of accidents arising out of the same event.

Costs (III) And in case the liability of the Assured shall be contested in any suit or action, we will also pay our proportion of such ensuing costs as the Assured may incur with the consent in writing of two-thirds in amount of the underwriters.

Returns Clause (IV) Should this Policy be cancelled in accordance with its terms by the Assured or by this Company, return premium under this clause shall be computed as follows:

Where the Hull Policy to which this endorsement is attached provides for six (6) months navigation or less, and the premium has been paid, this Company shall return six per cent (6%) net of the annual premium for every fifteen (15) consecutive days of the unexpired time of the working period and one per cent (1%) net of the annual premium for every fifteen (15) consecutive days of the unexpired time of the layup period. Minimum premium to be retained Ten Dollars ($10.00).

Where the Hull Policy to which this endorsement is attached provides for more than six (6) months navigation, and the premium has been paid, this Company shall return three per cent (3%) net of the annual premium for every fifteen (15) consecutive days of the unexpired time. Minimum premium to be retained Ten Dollars ($10.00).

Notwithstanding the foregoing, this Policy is warranted free from any claim arising directly or indirectly under the Federal "Longshoremen's and Harbor Workers' Compensation Act."

Form H 9625 9-38 3M PRINTED IN U.S.A.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION INSURANCE

Assured R. C. Jeffcott

In consideration of a premium of $ 90.00 being at the rate of - - -

This Company agrees to insure

At and from noon of the 24th day of June, 19 38,

until noon of the 24th day of June, 19 39,

beginning and ending with noon, Eastern Standard TIME

Aux. Diesel Schooner "Dauntless"

unless sooner terminated as provided herein, the liability of the assured in respect of the yacht which shall arise under the Longshoremen's and Harbor Workers' Compensation Act being Public Act No. 803 of the 69th Congress, approved March 4th, 1927, and all laws amendatory thereof or supplementary thereto which may be or become effective while this Policy is in force.

The Company expressly reserves the right to cancel this Policy if the premium is not paid by the assured within sixty days after the attachment of this Policy by the mailing of the notices of such cancellation to the parties enumerated in Paragraph five (5) of this Endorsement and subject to the conditions of said Paragraph.

The Company will carry out the provisions of Section 35 of said Act. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the Company from payment of compensation and other benefits lawfully due for disability or death sustained by any employee during the life of the Policy.

The Company agrees to abide by all the provisions of said Act and all lawful rules, regulations, orders and decisions of the United States Employees' Compensation Commission and of the Deputy Commissioner having jurisdiction, unless and until set aside, modified, or reversed by a court having jurisdiction of the parties and the subject matter.

This Policy shall not be cancelled prior to the date specified in this Policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the Commission, to the Deputy Commissioner, and to this Employer. If this Policy be cancelled at the option of this Company pro rata rates will be charged, if at the request of the assured short rates will be charged. From all return premiums the same percentage of deduction (if any) shall be made as was allowed by this Company on receipt of original premium.

It is understood and agreed that this insurance fully covers the liability of the assured insuring under said Act but in no case does this insurance extend beyond the provisions of said Act.

It is agreed that upon payment of any loss, damage, or expense the Company is to be subrogated to all the rights of the assured to the extent of such payment.

This Policy is not assignable.

Attached to and forming part of Policy No. 8565, of the ÆTNA INSURANCE COMPANY, OF THE ÆTNA FIRE GROUP, Hartford, Connecticut.

Frank F. Byrd
Secretary

W. Ransom McCain
President

Dated June 7th, 1938 at Boston, Mass.

Form H 4908 Ed. May 28 9-38 m

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No. Y 8565

MARINE DEPARTMENT — YACHT POLICY

Ætna Insurance Company

HARTFORD, CONNECTICUT

240.00
Addl. 90.00
360.00

Amount Insured, $ 240,000. *Rate* 1 *Per Cent.* *Premium,* $ 2,400.00

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED AND

Of Twenty-four Hundred & 00/100 DOLLARS ($ 2,400.) PREMIUM,

Does Insure R. C. Jeffcott

To an Amount not exceeding Two Hundred Forty Thousand DOLLARS ($ 240,000.),

At and from June 24th, 19 38, at noon, to June 24th, 19 39, at noon, when this Policy shall cease and expire, unless sooner terminated or made void by the conditions hereinafter expressed.

LARGE YACHTS

In name of R. C. Jeffcott *for account of whom it may concern.*

Loss, if any, payable to him

Do make insurance, and cause to be insured, lost or not lost,

For ($ 240,000.) Two Hundred Forty Thousand *Dollars,*

At and from June 24th, 1938 *Noon, Eastern Standard Time,*

To June 24th, 1939 " " " "

Upon the Hull, Spars, Sails, and all Tackle and Apparel, Materials, Fittings, Boats, including Launches of every description, Furniture, Fuel, Provisions, Stores, Supplies, Ordnance, Munitions, Artillery, Refrigerating and Electric Light Plants and Installation and all Machinery, Boilers, Engines, etc., for so much as concerns the Assured, by agreement between the Assured and Assurers in this Policy, are and shall be

valued at $ 240,000. of and/or in or on the Aux. Diesel Sch. Yacht "Dauntless" or by whatsoever other name or names the said yacht is or shall be named or called, beginning the adventure upon the said yacht, etc., as above, and shall so continue and endure during the period as aforesaid. Should

om strikes, riots, civil
e $ 240. is hereby charged.

upon the said yacht, etc., as above, and shall so continue and endure during the period as aforesaid. Should the above vessel on the expiration of this Policy be at sea, or in distress, or at a port of refuge, or of call it is agreed to hold her covered until arrival at port of destination on her being moored therein twenty-four hours in good safety (provided that before the expiration the Assured shall have given notice of intention to so continue) at a *pro rata* monthly premium, and it shall be lawful for the said yacht, etc., to proceed and sail to and touch and stay at any Port or Places whatsoever and wheresoever without prejudice to this insurance.

TOUCHING the adventures and perils which we, the said assurers, are contented to bear and take upon us, they are of the Seas (It is understood and agreed that "sea" or "seas" where used in this form is intended and does include rivers, lakes and/or other inland waters), Fire, Pirates, Rovers, Assailing Thieves, Jettisons, Barratry of the Master and Mariners, and all other like perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said vessel, etc., or any part thereof. And in case of any loss or misfortune it shall be lawful for the assured, their factors, servants and assigns to sue, labor and travel for, in and about the defence, safeguard and recovery of the said vessel, etc., or any part thereof, without prejudice to this insurance; to the charges whereof the said Assurers will contribute according to the Rate and Quantity of the sum herein insured. And it is expressly declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment. Having been paid the consideration for this insurance, by the Assured or assigns at and after the rate of one per cent.

To Return { .....percent net for every fifteen (15) consecutive days the vessel may be laid up and out of commission during working period and arrival.
{ .....percent net for every fifteen (15) consecutive days of unexpired time of working period and
{ .....percent net for every fifteen (15) consecutive days of unexpired time of lay up period if this policy be cancelled—and arrival.

It is agreed that either party may cancel this policy by giving the other ten (10) days written notice in which event the assurers to return to the assured any unearned premium due under the rates of return provided above.

Particular average payable on the whole valuation if amounting to $ IRRESPECTIVE OF PERCENTAGE, or the ship be stranded, sunk, burnt, on fire or in collision.

In the event of this Policy beginning or ending, while the vessel is on course of a voyage, underwriters agree to pay their proportion of loss or damage sustained while the Policy is in force, provided the loss or damage sustained on the entire voyage would have been recoverable if the Policy had covered such voyage in its entirety.

As employment may offer, in port and at sea, in docks and graving docks, and on ways, slipways, railways, gridirons and pontoons, at all times, in all places and on all occasions, under steam or sail, with leave to sail with or without Pilots, to tow and to be towed, and to assist vessels and/or craft in all situations and to any extent, to render salvage services, and to go on trial trips. With liberty to discharge, exchange, and to take on board passengers and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to carry stores etc., on deck or otherwise. With leave to dock, undock, and change docks as often as may be required, and to go on slipway or railway, gridiron and/or pontoons, etc., and to adjust companions.

In case of claim, repairs to be paid without deduction of "NEW FOR OLD," whether the average be particular or general.

General average and salvage charges payable in accordance with the Laws of the United States. And in the event of salvage, towage, or other assistance being rendered to the vessel hereby insured, by any vessel belonging in part or in whole to the same owners, it is hereby agreed that the value of such services (without regard to the common ownership of the vessels) shall be ascertained by Arbitration in the same manner provided under the Collision Clause and the amount so far as applicable to the interest hereby insured, shall constitute a charge under this Policy. Warranted free of claim for wages and provisions in general average.

This insurance is to fully indemnify the assured for any and all charges and expenses applicable to the vessel, notwithstanding that the contributory value of the vessel be in excess of the value as agreed to herein.

In the event of total or constructive total loss, no claim to be made by the Underwriters for charter money or other earnings, whether notice of abandonment has been given or not. The insured value to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss.

Losses shall be payable in thirty days after proof of loss or damage covered by this Policy, and of the interest of the assured shall have been made and presented to this Company (the amount of premium on this policy, if unpaid, and all other indebtedness due this Company being first deducted).

It is understood and agreed that should any part of the Furniture, Tackle, Boats, or other property of this yacht be separated and laid up on shore during the period of this Policy, then this Policy shall cover the same against the risks of fire, explosion, tornado, windstorm and rising navigable waters only, to an amount not exceeding its proportion of $ 48,000.

Warranted by the assured that the within named vessel shall be laid up and out of commission at the Thames Ship Yard, New London, Connecticut during the currency of this policy.

Privilege to navigate coastwise and inland tributary waters between - - - - - - -

and - - - - - - - - both inclusive, during the currency of this Policy.

Warranted free from Capture, Seizure, Arrests, Restraints and Detention, and the consequences of any attempt thereat, and all other consequences of hostilities (Piracy and Barratry excepted).

Warranted free of loss or damage caused by strikers, locked out workmen, or persons taking part in labor disturbances, or riots, or civil commotions.

Warranted free of claim for any loss or damage occurring while the within insured vessel is engaged in any contraband or prohibited or illicit trade.

Warranted free from loss or damage to masts, spars or sails while racing.

And it is further agreed that if the vessel hereby insured shall come into collision with any other ship or vessel, and the Assured shall, in consequence thereof, become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the yacht hereby insured, we, the Assurers, will pay the Assured such proportion of such sum or sums so paid as our subscriptions hereto bear to the value of the yacht hereby insured. And in cases where the liability of the yacht has been contested with the consent, in writing, of a majority of the underwriters on the hull, etc. (in amount), we will also pay a like proportion of the cost thereby incurred or paid; but when both vessels are to blame, then, unless the liability of the owners of one or both of the vessels become limited by law, claims under the Collision Clause shall be settled on the principle of CROSS LIABILITIES as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision; and it is further agreed, that the principles involved in this clause shall apply to the case where both vessels are the property, in part or in whole, of the same owners. And provisions of responsibility and extent of liability as between the two vessels being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the managing owners of both vessels, and one to be appointed by the majority in amount of Underwriters interested in each vessel; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single, or of any two of such three Arbitrators, appointed as above, to be final and binding.

Provided always that this clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the Insured Vessel, or for loss of life or personal injury.

This insurance also to cover subject to the special terms of this Policy, loss of and/or damage to hull or machinery through the NEGLIGENCE of Master, Mariners, Engineers or Pilots, or through explosions, howsoever and wheresoever occurring, bursting of boilers, breaking of shafts, or through any LATENT DEFECT in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the vessel, or any of them, or by the Manager.

This insurance shall be void in case this policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of this Company.

Including all risks of default and/or error in judgment of master, mariners, engineers, pilots or crew.

It is hereby understood and agreed that personal negligence or fault of the assured in the actual navigation of the vessel, or his or their privity or knowledge in respect thereto, shall not relieve the assurers of liability under this policy or any endorsements attached hereto.

In event of any unintentional error in description of the vessel, or any deviation beyond the waters permitted by this policy, it is hereby agreed to hold the assured covered, provided notice be given this company so soon as known to the assured and additional premium be paid at rates of this company.

No suit or action on this Policy or for the recovery of any claim hereunder shall be sustainable in any court of law or equity unless commenced within twelve (12) months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the State wherein this Policy is issued, then and in that event no suit or action under this Policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State.

The terms and conditions of this form are to be regarded as substituted for those of the Policy to which it is attached; the latter being hereby waived.

WM. WALLACE & CO.
Boston

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Appendix A

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The within policy is extended to cover loss or damage to the within insured yacht resulting from collision and acts of person or persons of malicious intent at 10% and an additional premium of $

Warranted that the within insured vessel shall be used only for private pleasure purposes.

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE FOREGOING STIPULATIONS AND CONDITIONS, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this Policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Assured unless so written or attached.

In Witness Whereof, this Company has executed and attested these presents; but this Policy shall not be valid unless countersigned by a duly authorized Officer or Agent of the Company.

Frank F. Bunce
Secretary

W. Ransom McCain
President

Countersigned at Boston, Mass.

this 7th *day of* June, *19*38

L. W. Wallace Jr.
Agent

A STOCK COMPANY

YACHT POLICY

No. Y. 8565

INSURED

H. C. Jaffcott

Aux. Diesel Schooner "Dauntless"

Amount Insured, . . . $ ~~250~~ 200,000.

Rate, ... 1 %

Premium, ... $ 3,090.00

Expires June 24th, 19 39

MORE THAN A CENTURY OF SERVICE
ÆTNA INSURANCE CO.
HARTFORD, CONN.
INCORPORATED 1819 CHARTER PERPETUAL

THE ÆTNA FIRE GROUP

JOHN C. ALDEN

Form H 5052 Ed. May, 1936 PRINTED IN U.S.A.

Of Four Hundred & 00/100 Dollars ($ 400.00) Premium,

Does Insure R. C. Jeffcott

To an Amount not exceeding Eighty Thousand Dollars ($ 80,000.),

At and from June 24th, 19 38 at noon, to June 24th, 19 39., at noon, when this Policy shall cease and expire, unless sooner terminated or made void by the conditions hereinafter expressed.

The within policy is extended by special conditions of this policy to cover loss or damage to the within insured Yacht resulting from strikes, riots, civil commotion and acts of person or persons of malicious intent at 5% and an additional premium of $40.00 is hereby charged.

In name of R. C. Jeffcott *for account of whom it may concern,*

Loss, if any, payable to him

Do make insurance and cause to be insured, lost or not lost,

At and from June 24th, 1938 noon, Eastern Standard Time

To June 24th, 1939 noon, Eastern Standard Time

On Disbursements and/or Ship Owner's Liability, as below of Aux. Diesal Schooner "Dauntless" for

$ - - - for $ 80,000.

or by whatsoever other name or names the said vessel is or shall be named or called, beginning the adventures upon the said interests, as above, and shall so continue and endure during the period as aforesaid. Should the above-mentioned vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge, or of call, said interests shall, provided previous notice be given to the Underwriters, be held covered at a *pro rata* monthly premium to said vessel's port of destination, and it shall be lawful for the said vessel, etc., to proceed and sail to and touch and stay at any ports or places whatsoever or wheresoever without prejudice to this insurance.

Disbursements.—Warranted free of all average and salvage charges being against the risk of the total or constructive total loss of vessel only. A total and/or constructive total loss paid by Underwriters on hull to be a total loss under this Policy.

Ship Owners' Liability.—This Policy is to pay its proportion of any sum or sums (not exceeding $ - - - or $ 80,000. in respect of any one collision) which the assured may be unable to recover under the "Collision Clause" as expressed in policies on hull and machinery valued at $ - - - or $ 240,000. by reason of that valuation. To pay also its proportion of such balance of General Average Claims, whether sacrifices and/or expenditures and/or sue and labor charges, and/or Claims for Salvage Charges as shall not be recoverable under policies on hull and machinery (for this purpose construing policies effected in America according to American law, and policies effected in Great Britain according to British law) by reason of the contributory value being greater than the insured value ($ - - - or $ 240,000.) less particular average, if any.

Touching the adventures and perils which we, the said assurers are contented to bear and take upon us, they are of the Seas (it is agreed that "seas" or "seas" where used in this form are intended and do include rivers, lakes and/or other inland waters), Men-of-War, Fire, Enemies, Pirates, Rovers Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what nation, condition or quality soever, Barratry of the Master and Mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said subject matter of this insurance, or any part thereof. And in case of any loss or misfortune it shall be lawful for the assured, their factors, servants and assigns to sue, labor and travel for, in and about the defense, safeguard and recovery of the aforesaid subject matter of this insurance, or any part thereof, without prejudice to this insurance. And it is expressly declared and agreed that no acts of the insurer or insured, in recovering, saving, or preserving the interest insured, shall be considered as a waiver or acceptance of abandonment. Having been paid the consideration for this insurance, by the Assured or his

assigns, at and after the rate of 1/2 per cent.

To return - - per cent. net for every 30 consecutive days the above vessel may be in port or in dock; during such period the said subject matter of this insurance being at the risk of the Underwriters—to return - - - per cent. net for every 30 days of unexpired time, if this policy be cancelled.

In port and at sea, in docks and graving docks, and on ways, slipways, railways, gridirons and pontoons, at all times, in all places and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without Pilots, to tow and to be towed, and to assist vessels and/or craft in all situations and to any extent, to render salvage services, and to go on trial trips.

This insurance also to cover subject to the special terms of this Policy loss of and/or damage to hull or machinery through the negligence of Masters, Mariners, Engineers, or Pilots, or through explosions howsoever and wheresoever occurring, bursting of boilers, breaking of shafts or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the vessel, or any of them, or by the Manager. Master, Mates, Engineers, Pilots or Crew, not to be considered as part owners within the meaning of this clause should they hold shares in the vessel.

It is agreed that any change of interest in the vessel hereby insured shall not affect the validity of this Policy.

The insured value to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss.

In the event of any breach of warranty, unintentional error in description of voyages, cargo, trade, locality, date of sailing, or any deviation from the conditions of this Policy, it is agreed to hold the assured covered, premium to be arranged afterwards.

The terms and conditions of this form are to be regarded as substituted for those of the Policy to which it is attached; the latter being hereby waived.

warranted free from Capture, Seizure, Arrest, Restraint and detention, and the consequences of any attempt thereat, and all other consequences of hostilities (Piracy and Barratry excepted).

This slip is not to be attached to the Policy, and the assured has permission to detach it from the clauses above should the Policy have to be produced in a court of law. Applying to disbursements only.

The production of this Policy to be deemed sufficient proof of interest.

Without benefit of salvage.

2.

Appendix B

Warranted laid up and out of commission at the Thames Ship Yard, New London, Conn. during the currency of this policy.

Libellant's Exhibit 2

No. Y 8566

MARINE DEPARTMENT

YACHT POLICY

Aetna Insurance Company

HARTFORD, CONNECTICUT

Amount Insured, $ 80,000. *Rate* 1/2 *Per Cent.* *Premium,* $ Addl. 40.00 400.00

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED AND

Of Four Hundred & 00/100 DOLLARS ($ 400.00) PREMIUM,

Does Insure R. O. Jeffcott

To an Amount not exceeding Eighty Thousand DOLLARS ($ 80,000.),

At and from June 24th, 19 38 at noon, to June 24th, 19 39, at noon, when this Policy shall cease and expire, unless sooner terminated or made void by the conditions hereinafter expressed.

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE FOREGOING STIPULATIONS AND CONDITIONS, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this Policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Assured unless so written or attached.

In Witness Whereof, this Company has executed and attested these presents; but this Policy shall not be valid unless countersigned by a duly authorized Officer or Agent of the Company.

Frank F. Bush
Secretary

W. Russell Cain
President

Countersigned at Boston, Mass.

this 7th *day of* June, *19* 38

L. W. Wallace & Co. *Agent*

A STOCK COMPANY

YACHT POLICY

No. Y. 3566

INSURED

H. C. Jeffcott

Aux. Diesel Schooner "Dauntless"

Amount Insured, . . . $ 80,000.

Rate, ... 1/2 %

Premium, ... $ 440.00

Expires June 24th, 19 39

MORE THAN A CENTURY OF SERVICE
ÆTNA
INSURANCE CO.
HARTFORD, CONN.
INCORPORATED 1819 CHARTER PERPETUAL

THE ÆTNA FIRE GROUP

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